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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re WMK Holdings, Inc.

Serial No. 88740503

Edward F. Behm, Jr. of Armstrong Teasdale LLP
for WMK Holdings, Inc.

Christopher J. Nodes, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

Before Mermelstein, Heasley, and Hudis,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, WMK Holdings, Inc., seeks registration on the Principal Register of the mark FRESH FROM THE FARM (in standard characters) for “meat; poultry; beef; pork,” in International Class 29.¹

¹ Application Serial No. 88740503 was filed on December 27, 2019, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

The Trademark Examining Attorney refused registration of Applicant's applied-for mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive of the identified goods.

Applicant appealed, and the issue is fully briefed. We affirm the refusal to register.

I. The Examining Attorney's and Applicant's Arguments and Evidence

The Examining Attorney maintains that FRESH FROM THE FARM merely describes a characteristic of Applicant's identified goods: "meat; poultry; beef; pork."² Citing dictionary definitions, he establishes that:

"FRESH" means "recently made, produced, or harvested; not stale or spoiled,"³

"FROM" means "indicating the source or provenance of ... something,"⁴ and

"FARM" means "an area of land and its buildings used for growing crops and rearing animals, typically under the control of one owner or manager."⁵

The Examining Attorney also cites nearly two dozen websites in which third parties use the phrase "fresh from the farm" to describe a characteristic of their goods.⁶ For example:

- *Keller's Farm Stores*: kellersfarmstores.com ("Our meats are **fresh from the farm**, cut fresh daily.");
- *Fairway Market*: blog.fairwaymarket.com ("We told you this bird is **fresh from the farm!**");

² Examining Attorney's brief, 6 TTABVUE 3.

³ March 26, 2020 Office Action TSDR 45, AHDictionary.com.

⁴ *Id.* at 47, Lexico.com.

⁵ *Id.* at 48, Lexico.com.

⁶ Examining Attorney's brief, 6 TTABVUE 5-7, March 26, 2020 Office Action at 51-55, April 22, 2020 Office Action at 7-69.

- *The Farmer's Rail*: thefarmersrail.com (“Because our meats are processed **fresh from the farm**, the size of our cuts may change daily.”);
- *Berkeleyside Nosh*: berkeleyside.com (“she’s added a butcher shop selling organic, **fresh-from-the farm** meats.”);
- *Gaston’s*: gastonsculinaryservices.com (“Olivor Heritage Farms will supply **fresh from the farm** Heritage Non GMO organic poultry, grass-fed beef, heritage nitrate free pork, lamb and other meats”);
- *Farmer Al’s*: farmer-als.com (“Now you can have the same experience and taste the difference when you serve your family healthy, nutritious meats... **fresh from the farm.**”);
- *Farm2Cook*: farm2cook.com (“Our goat and chicken products were all **fresh from the farm**, organic, grass fed and free range.”); and
- *Hatfield*: hatfieldqualitymeats.com (“Our premium pork products always come **fresh from the farm.**”).

The Examining Attorney concludes:

The voluminous evidence in the record shows that consumers are accustomed to seeing the applied-for mark used to describe a characteristic of meat, poultry, beef, and pork. Accordingly, when purchasers see the phrase FRESH FROM THE FARM associated with applicant’s food, they will immediately understand that applicant’s goods are recently made or produced—not stale or spoiled—from a source that is an area of land and its buildings used for growing crops and rearing animals, typically under the control of one owner or manager.⁷

Applicant “does not argue against the definition of the separate elements of the mark as provided by the Examining Attorney upon dissection....”⁸ It suggests, however, that the applied-for mark should be considered in its entirety and not broken into distinct parts.⁹ (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*,

⁷ Examining Attorney’s brief, 6 TTABVUE 7.

⁸ Applicant’s reply brief, 7 TTABVUE 8.

⁹ Applicant’s brief, 4 TTABVUE 7, Applicant’s reply brief, 7 TTABVUE 7.

252 U.S. 538, 545-46 (1920)). Applicant points out that a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. (Citing *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow removal hand tool).)¹⁰

Viewed as a whole, the applied-for mark is suggestive, Applicant submits, as it requires imagination, thought, or perception to reach a conclusion as to the nature of the goods (Citing *In re George Weston Ltd.*, 228 USPQ 57 (TTAB 1985) (SPEEDI BAKE and Design for frozen dough only vaguely suggests that it quickly and easily may be baked into bread); *In re Noble Co.*, 225 USPQ 749, 750 (TTAB 1985) (NOBURST for liquid antifreeze and rust inhibitor for hot water heating systems “suggests a desired result of using the product rather than immediately informing the purchasing public of a characteristic, feature, function, or attribute thereof.”)).¹¹

In this case, Applicant argues:

[T]he mark does not define the goods (i.e. meat products), since there is nothing in the identification of the goods that includes a “farm” or “the rearing of animals.” The Applicant’s goods are not a “farm,” and the goods can also not be identified by the consumer on an understanding that they are not “stale or spoiled.”¹²

[I]t cannot be immediately assumed that FRESH FROM THE FARM means that there are meat products being sold. It is just as likely that the

¹⁰ Applicant’s reply brief, 7 TTABVUE 6-7.

¹¹ Applicant’s reply brief, 7 TTABVUE 7-8.

¹² Applicant’s reply brief, 7 TTABVUE 8.

nature of the goods conjured by the mark include other types of food (e.g. fruits, vegetables, or nuts)....¹³

Additionally, consumers imagination, thought, or perception will be required to consider the nature of the goods with respect to their source from a farm in regard to whether the farm is “typically under the control of one owner or manager,” ... or is owned by many shareholders or a consortium of entities as can be the case for a majority of meat products that are currently produced in factory farms.¹⁴

Applicant concludes that the applied-for mark is not merely descriptive, but suggestive.

II. Analysis

Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of an applied-for mark that, when used in connection with the applicant’s goods or services, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017), *quoted in Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018).

In *Estate of P.D. Beckwith*, on which Applicant relies, the Supreme Court explained why merely descriptive terms have long been denied registration:

It was settled long prior to the Trade-Mark Registration Act that the law would not secure to any person the exclusive use of a trade-mark consisting merely of words descriptive of the qualities, ingredients or characteristics of an article of trade; this for the reason that the function of a trade-mark is to point distinctively, either by its own meaning or by association, to the

¹³ Applicant’s reply brief, 7 TTABVue 9.

¹⁴ Applicant’s reply brief, 7 TTABVue 9.

origin or ownership of the wares to which it is applied, and words merely descriptive of qualities, ingredients or characteristics, when used alone, do not do this. Other like goods, equal to them in all respects, may be manufactured or dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public.

Estate of P.D. Beckwith, 252 U.S. at 543-44.

Although that Supreme Court opinion construed the predecessor Trademark Act of 1905, as amended, the principles it enunciated hold true today: “The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.” *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978)).

Applicant does not take issue with the definitions of FRESH FROM THE FARM’s constituent words. The Examining Attorney’s dictionary definitions establish the commonly accepted meaning of the words “FRESH,” “FROM,” and “FARM.” The word “THE” before “FARM” “does not have any trademark significance. ‘The’ is a definite article. When used before a noun, it denotes a particular person or thing.” *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

However, because the phrase consists of a combination of descriptive words, we must consider “whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *In re Oppedahl & Larson LLP*, 373 F.3d 1171,

71 USPQ2d 1370, 1372 (Fed. Cir. 2004), *cited in Real Foods v. Frito-Lay*, 128 USPQ2d at 1374. We find it does not. As the third-party evidence manifestly demonstrates, “fresh from the farm” is commonly used by purveyors to describe newly produced meat, including poultry, beef, and pork. Each component retains its merely descriptive significance in relation to the goods, such that the composite is itself merely descriptive. *In re Oppedahl & Larson*, 71 USPQ2d at 1371.

The case law on which Applicant relies is inapposite. *In re Colonial Stores* concerned a double entendre, SUGAR & SPICE, and *In re Shutts* found the term SNO-RAKE incongruous, as snow is not normally removed with a rake. Neither exception obtains in this case, as “FRESH FROM THE FARM” conveys no double meaning, and is not incongruous as used with foodstuffs. *In re George Weston* and *In re The Noble Co.* concerned marks that suggested their goods’ desired end results. The phrase “FRESH FROM THE FARM” immediately conveys information about a characteristic of the foodstuffs being offered to shoppers in stores. *See In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

To be merely descriptive, the applied-for mark need not “define” or “identify” the goods, as Applicant suggests, as that is the mark of genericness. *See Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 329 (1985); *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986) (a generic term is the common descriptive name of a class of goods or services) *quoted in Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018).

The fact that FRESH FROM THE FARM could describe foods other than meats—such as fruits, vegetables, or nuts—is beside the point. The question is not whether someone presented only with the mark could guess the goods listed in the identification of goods. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)). “Descriptiveness must be evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.’” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). Here, it is apparent from the third-party evidence that average purchasers, such as shoppers in supermarkets, are frequently exposed to advertisements promoting meats as “farm fresh,” and would understand the applied-for mark as another example of that use. This would hold true whether the meats come from farms or ranches operated a sole proprietor or a consortium.

III. Conclusion

FRESH FROM THE FARM immediately conveys information about a characteristic of Applicant’s meat, poultry, beef, and pork to food shoppers. *In re N.C. Lottery*, 123 USPQ2d at 1709. The Examining Attorney’s dictionary definitions and third-party evidence indicate that this descriptive phrase is “in the public domain and

should be free for use by all who can truthfully employ them to describe their goods.”

Hoover Co. v. Royal Appliance Mfg. Co., 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith*, 252 U.S. at 543-44).

Decision: The refusal to register Applicant’s applied-for mark, FRESH FROM THE FARM, is affirmed on the ground of mere descriptiveness under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1).